

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVON E. SMITH,

Defendant-Appellant.

UNPUBLISHED

June 13, 2006

No. 259828

Wayne Circuit Court

LC No. 04-009306-01

Before: Whitbeck C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 270 months to life imprisonment for the second-degree murder and assault with intent to commit murder convictions, and to two years' imprisonment for the felony-firearm conviction. Because the trial court did not err when it denied defendant's motion for a directed verdict on the first-degree murder charge, and because defendant failed to show that the trial court did not consider the lesser offenses of manslaughter before imposing judgment, or that the evidence presented supported a manslaughter conviction, or that he acted in self-defense or in defense of others, we affirm defendant's convictions. However, because defendant's sentence is invalid pursuant to the indeterminate sentencing statute, MCL 769.9(2), we remand for resentencing.

This case arises from the shooting death of Christopher Pritchett at a Citgo Gas Station in Detroit on July 24, 2004. Defendant first argues that the trial court erred when it denied his motion for a directed verdict of acquittal on the charge of first-degree murder. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To prove first-degree murder the prosecution must show that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); MCL 750.316(1)(a). Defendant specifically asserts that the evidence presented by the prosecution failed to show that the bullets that killed Christopher Pritchett came from defendant's weapon. Defendant maintains that the prosecution

failed to prove that he committed a homicide, and therefore, the trial court should have granted his motion for a directed verdict on the charge of first-degree murder. Since defendant does not challenge the premeditation element of first degree murder, our review is strictly limited to whether the prosecution provided sufficient evidence to prove defendant killed the victim.

At trial, by the close of the prosecution's case, the prosecutor had presented evidence to show that defendant fired several shots at Pritchett at the service station and that Pritchett died from multiple gunshot wounds. Allen Pennington identified defendant as one of the two men he witnessed shooting at him and Pritchett at the gas station. It is defendant's position that the trial court should have granted his motion because the prosecution did not present evidence showing that the bullets that killed Pritchett came from defendant's gun. In particular, defendant states that he used a .38 revolver and not a .9 millimeter, and therefore, the trial court should have granted his motion for directed verdict. However a review of the record reveals that when defendant moved for a directed verdict, neither party had introduced any evidence regarding what type of weapon defendant had at the shooting. The only evidence presented showing what type of weapon defendant used in the shooting came from defendant, which he presented after moving for a directed verdict. Although Pennington was unable to identify the gun used in the shooting because he only saw the "fire from the gun" and not the gun itself, he steadfastly maintained that defendant fired shots at him and Pritchett.

This Court has found that circumstantial evidence and reasonable inferences arising from the evidence presented can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Although there were two people who were firing shots at Pennington and Pritchett, evidence showed that defendant was one the shooters. When viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have been persuaded that defendant committed a homicide when he shot at the victim several times and the victim was shot and killed as a result of multiple gunshot wounds. *Aldrich, supra*, p 122. Because the prosecution presented evidence creating the inference that defendant caused Pritchett's death, the only element he challenges on appeal, the trial court properly denied defendant's motion for directed verdict. *Aldrich, supra*, p 124.

Defendant argues next on appeal that the trial court failed to consider the lesser included offense of manslaughter before imposing judgment. After a bench trial, the trial court found defendant guilty of second-degree murder for the death of Pritchett. The trial court found that defendant's actions were not justified or "done under circumstances that reduced it to a lesser crime." The court found that defendant "did intend to kill [Pritchett], or at the very least [he] knowingly created a very high risk of death or great bodily harm." Although the court did not specifically state that it considered the lesser offense of manslaughter, it is clear by the court's language that it considered manslaughter and determined that the evidence did not support the lesser crime. Even if the trial court did not consider the lesser offense of manslaughter, the error was harmless because the evidence does not support a finding of manslaughter. *People v Considine*, 196 Mich App 160, 162-163; 492 NW2d 465 (1992).

Although defendant maintains that the court should have considered the lesser offenses of involuntary and voluntary manslaughter, the evidence does not support such a consideration. "[A] voluntary manslaughter conviction requires proof sufficient to sustain a conviction of second-degree murder, along with evidence of provocation as a mitigating factor. *People v Darden*, 230 Mich App 597, 602; 585 NW2d 27 (1998). Because the evidence presented at trial

failed to show provocation, a voluntary manslaughter consideration was not warranted. The evidence does not support manslaughter, voluntary or involuntary, because the prosecution presented sufficient evidence to show that defendant acted with malice with he fired shots at Pennington and Pritchett. “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice can be inferred from the circumstance surrounding the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Record evidence showed that defendant fired several shots at Pennington and Pritchett at a time when the men were unarmed. At the time of the shooting, Pennington and Pritchett were not in close proximity to defendant, but rather, were on the other side of the gas station. Thus, we can infer malice from defendant’s actions of shooting at two unarmed men who were not in close proximity to him or an immediate threat to him or another person.

Defendant’s assertion that he acted in self-defense and the defense of others specifically, Ahmad Person, is also unsupported by the record. “[T]he killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force.” *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). The evidence presented showed that neither Pritchett or Pennington were armed when defendant fired shots at them. In fact, the evidence showed that Pritchett was near his car when defendant fired shots at him. Medical testimony demonstrated that defendant’s wounds indicate that he was not shot within close range, thus establishing that defendant and Pritchett were not in close proximity to each other when the shots were fired. And, a review of the record reveals that defendant could not have reasonably believed that he or Person were in imminent danger from two unarmed men or that the use of deadly force was necessary. Defendant’s self-defense and defense of others claim fails.

We *sua sponte* remand this matter for resentencing. Defendant’s sentence of 270 months to life imprisonment for the second-degree murder and assault with intent to commit murder convictions are invalid. A sentence of a minimum number of years to a maximum of life is invalid under the indeterminate sentencing statute. MCL 769.9(2); *People v Foy*, 124 Mich App 107, 110; 333 NW2d 596 (1983). The trial court may sentence defendant to an indeterminate term of years, i.e. 270 months to some number of months, or life imprisonment, but not both.

Affirmed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio